

PAGES 1 - 7

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE HAYWARD S. GILLIAM, JR., JUDGE

BRANDON HODGES, FOR HIMSELF, AND )  
ALL OTHERS SIMILARLY SITUATED, )  
PLAINTIFFS, )

VS. )

COMCAST CABLE COMMUNICATIONS, LLC, )  
A DELAWARE LIMITED LIABILITY )  
COMPANY, )  
DEFENDANT. )

) NO. C 18-1829 HSG

) THURSDAY

) SEPTEMBER 6, 2018

) 2:00 O'CLOCK P.M.

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

**FOR PLAINTIFFS:**

**GALLO LLP**

1604 SOLANO AVENUE, SUITE B  
ALBANY, CALIFORNIA 94707

**BY: DOMINIC R. VALERIAN, ESQUIRE**

**FOR DEFENDANT:**

**AKIN GUMP STRAUSS HAUER & FELD, LLP**

TWO COMMERCE SQUARE  
2001 MARKET STREET, SUITE 4100  
PHILADELPHIA, PA 19103

**BY: MICHAEL W. MCTIGUE, JR., ESQUIRE**

**REPORTED BY: KATHERINE WYATT, CSR 9866, RMR, RPR**

1 **SEPTEMBER 6, 2018**

2:00 O'CLOCK P.M.

3 **P R O C E E D I N G**

4 **THE CLERK:** WE'RE CALLING 18-1829, HODGES VERSUS  
5 COMCAST CABLE COMMUNICATION, LLC.

6 PLEASE STEP FORWARD AND STATE YOUR APPEARANCES  
7 FOR THE RECORD, PLEASE.

8 **MR. MCTIGUE:** GOOD AFTERNOON, YOUR HONOR.  
9 MICHAEL MCTIGUE, AKIN GUMP, FOR COMCAST.

10 **THE COURT:** ALL RIGHT. GOOD AFTERNOON,  
11 MR. MCTIGUE.

12 **THE CLERK:** PLAINTIFFS' COUNSEL, YOU NEED TO  
13 STATE YOUR APPEARANCE.

14 **MR. VALERIAN:** GOOD MORNING YOUR HONOR. DOMINIC  
15 VALERIAN FOR PLAINTIFFS.

16 **THE COURT:** GOOD AFTERNOON, MR. VALERIAN. ALL  
17 RIGHT. WE'RE HERE FOR A HEARING ON THE MOTION TO COMPEL  
18 ARBITRATION.

19 I'VE REVIEWED THE PAPERS AND OBVIOUSLY THERE IS  
20 A DECISION I'LL HAVE TO MAKE AS TO WHETHER I AGREE WITH ONE  
21 SET OF MY COLLEAGUES OR THE OTHER ON THIS QUESTION. BUT  
22 THE OBVIOUS ISSUE THAT OCCURRED TO ME IS THAT EVERYONE  
23 ACKNOWLEDGES THAT THIS EXACT ISSUE IS BEFORE THE NINTH  
24 CIRCUIT RIGHT NOW IN FOUR CASES.

25 WHY SHOULD I NOT JUST STAY AND WAIT UNTIL THE

1 NINTH CIRCUIT DECIDES THE ISSUE AND PROCEED FROM THERE?

2 **MR. MCTIGUE:** YOUR HONOR, I THINK THE NINTH  
3 CIRCUIT IS GOING TO DIRECTLY ADDRESS, MOST LIKELY, THE  
4 PREEMPTION ISSUE. WE DO NOT BELIEVE YOU NEED TO REACH THAT  
5 ISSUE IN ORDER TO DECIDE OUR MOTION. ON ITS FACE, WE DO  
6 NOT BELIEVE THE PLEADING SEEKS PUBLIC INJUNCTIVE RELIEF.

7 THE RELIEF SOUGHT IN THIS MATTER IS, ON ITS FACE  
8 AND AS PLED, REALLY CLASS SPECIFIC. IT SEEKS TO ENJOIN  
9 COMCAST.

10 **THE COURT:** WAIT. HOLD ON. JUDGE CHHABRIA'S  
11 CASE, IT STRUCK ME, RAISES ALL OF THE ISSUES YOU'VE  
12 PRESENTED HERE, DOESN'T IT?

13 **MR. MCTIGUE:** IN THAT CASE THERE WAS NO POSITION  
14 TAKEN THAT THE RELIEF REQUESTED WAS NOT A PUBLIC  
15 INJUNCTION. COMCAST DID NOT TAKE THE POSITION IN THAT CASE  
16 THAT THE RELIEF REQUESTED WAS NOT A PUBLIC INJUNCTION. IN  
17 THIS CASE -- AND THAT CASE DEALT WITH ADVERTISEMENTS,  
18 GENERALLY, TO THE PUBLIC THAT THEY SOUGHT TO ENJOIN.

19 THIS CASE THE RELIEF SOUGHT IS SPECIFIC TO  
20 COMCAST CABLE SUBSCRIBERS. IT IS CLASS RELIEF THAT THEY  
21 ARE SEEKING, NOT RELIEF FOR THE BENEFIT OF THE PUBLIC AT  
22 LARGE.

23 **THE COURT:** HASN'T MCGILL DIRECTLY SAID THAT AS A  
24 MATTER OF CALIFORNIA LAW THIS IS PUBLIC INJUNCTIVE RELIEF?

25 **MR. MCTIGUE:** NO, YOUR HONOR. IN FACT, MCGILL

1 SAYS THERE'S A DIFFERENCE BETWEEN RELIEF THAT IS SOUGHT  
2 THAT IS CLASS SPECIFIC FOR A SUBSET OF PLAINTIFFS AND  
3 PUTATIVE CLASS MEMBERS VERSUS RELIEF THAT IS SOUGHT LARGELY  
4 FOR THE BENEFIT OF THE PUBLIC AT LARGE.

5 **THE COURT:** WHERE IN MCGILL DO YOU DRAW THAT.

6 **MR. MCTIGUE:** IT'S CITED IN OUR PAPERS WHERE  
7 MCGILL DISCUSSES THE DIFFERENCE BETWEEN PUBLIC INJUNCTIVE  
8 RELIEF AND PRIVATE RELIEF. I'LL TRY TO FIND THAT FOR YOU,  
9 THE CITATION.

10 IT'S, YOUR HONOR, AT PAGE 90. SO MCGILL NOTES  
11 THE DIFFERENCE BETWEEN THE TYPE OF RELIEF THAT'S SOUGHT.  
12 AND IT SAYS:

13 "PUBLIC INJUNCTIVE RELIEF IS RELIEF THAT HAS  
14 THE PRIMARY PURPOSE AND EFFECT OF PROHIBITING UNLAWFUL ACTS  
15 THAT THREATEN FUTURE INJURY TO THE GENERAL PUBLIC."

16 **THE COURT:** OKAY. IT'S PAGE 90.

17 **MR. MCTIGUE:** NINETY, YOUR HONOR, YES.

18 **THE COURT:** THE CASE IS 2 CAL FED 945. SO WHAT DO  
19 YOU MEAN 90?

20 **MR. MCTIGUE:** I'M SORRY. 393 PACIFIC 3RD 90 IS  
21 WHAT I'M LOOKING AT.

22 **THE COURT:** SO WHAT'S THE CITE TO THE CALIFORNIA  
23 REPORTER PAGE?

24 **MR. MCTIGUE:** I'M SORRY. I DON'T HAVE THAT IN MY  
25 PAPERS.

1           **THE COURT:** ALL RIGHT. SO LET ME STOP YOU.

2           **MR. MCTIGUE:** OKAY.

3           **THE COURT:** GOING BACK TO MY INITIAL QUESTION,  
4 YOU ARE SEEKING AN ORDER COMPELLING ARBITRATION AND STAYING  
5 OR DISMISSING THIS MATTER. CORRECT?

6           **MR. MCTIGUE:** CORRECT.

7           **THE COURT:** PART OF THE RELIEF THAT YOU'RE  
8 SEEKING IS A STAY.

9           **MR. MCTIGUE:** PENDING ARBITRATION.

10          **THE COURT:** WHY WOULD YOU OPPOSE A STAY PENDING  
11 RESOLUTION OF AT LEAST SOME, IF NOT ALL, OF THE ISSUES THAT  
12 ARE IMPLICATED IN THE PENDING APPEALS?

13          **MR. MCTIGUE:** YOUR HONOR, I THINK COURTS TRY TO  
14 AVOID CONSTITUTIONAL QUESTIONS, IF THEY CAN. THE  
15 PREEMPTION ISSUE THAT IS BEFORE THE NINTH CIRCUIT IS A  
16 CONSTITUTIONAL QUESTION. WE ARE JUST SAYING ON THE FACE OF  
17 THE PLEADING AND WHAT'S AT ISSUE HERE THIS COURT NEED NOT  
18 ADDRESS, NEED NOT GET TO THE CONSTITUTIONAL QUESTION OF  
19 PREEMPTION, WHICH IS WHAT THE NINTH CIRCUIT IS DEALING  
20 WITH.

21          **THE COURT:** WHAT WOULD BE THE PREJUDICE TO YOUR  
22 CLIENT FROM A STAY PENDING RESOLUTION OF THE APPEALS.

23          **MR. MCTIGUE:** THERE WOULDN'T BE, YOUR HONOR, IF  
24 THAT'S THE WAY THE COURT WOULD LIKE TO GO. THERE REALLY  
25 WOULDN'T BE.

1                   **THE COURT:** ALL RIGHT. FAIR ENOUGH.

2                   MR. VALERIAN, WHAT IS YOUR POSITION ON THE  
3 QUESTION OF A STAY PENDING RESOLUTION OF THE APPEALS?

4                   **MR. VALERIAN:** WE WOULD PREFER NOT TO HAVE THE  
5 CASE STAYED. IN THE EVENT THAT WE LOSE FOR SOME OTHER  
6 REASON, OTHER THAN ON THE PREEMPTION ISSUE, WE'D LIKE TO BE  
7 ABLE TO GET A SEPARATE APPEAL GOING AND MOVE THE CASE  
8 FORWARD.

9                   WE ALSO THINK THAT WE SHOULD PREVAIL AND BE ABLE  
10 TO PROCEED WITH DISCOVERY.

11                  **THE COURT:** OKAY. WHAT PARTICULAR ISSUES ARE  
12 PRESENTED HERE THAT WOULD NOT BE -- LET ME PUT IT IN THE  
13 REVERSE WAY.

14                  YOU WOULD AGREE THAT ONE OF THE ISSUES THAT IS  
15 AT STAKE IN THIS CASE IS THE PREEMPTION ARGUMENT. CORRECT?

16                  **MR. VALERIAN:** THAT'S CORRECT.

17                  **THE COURT:** THE EXACT SAME PREEMPTION ARGUMENT  
18 THAT IS BEFORE THE NINTH CIRCUIT AND THE APPEALS. RIGHT?

19                  **MR. VALERIAN:** AGREED.

20                  **THE COURT:** SO WHETHER I NEED TO GET TO IT OR  
21 NOT, WOULDN'T THE RESOLUTION OF THOSE APPEALS AT LEAST TELL  
22 ME THE ANSWER ON THAT QUESTION?

23                  **MR. VALERIAN:** YES.

24                  **THE COURT:** SO WHAT WOULD BE THE PREJUDICE TO  
25 YOUR CLIENT FROM A STAY PENDING RESOLUTION OF THE APPEALS?

1           **MR. VALERIAN:** I THINK IT'S JUST POTENTIAL DELAY.  
2 IF THE CASE WERE TO BE RESOLVED ON A DIFFERENT ISSUE THAN  
3 PRESUMPTION. IF WE PROCEED WITH THAT NOW, WE COULD -- I  
4 MEAN, COMCAST IS PROBABLY GOING TO APPEAL NO MATTER WHAT.

5           **THE COURT:** AS WOULD YOU, WOULDN'T YOU?

6           **MR. VALERIAN:** RIGHT.

7           **THE COURT:** YOU WOULD SEEK MANDAMUS.

8           **MR. VALERIAN:** LIKELY SO. SO THE APPEAL WOULD BE  
9 PENDING NOW AS OPPOSED TO THE POSSIBILITY OF WAITING UNTIL  
10 THE RESOLUTION OF THIS PREEMPTION ISSUE, AND THEN, YOU  
11 KNOW, BEGINNING A SEPARATE APPEAL OF THESE ISSUES THAT  
12 HAVEN'T YET BEEN ADDRESSED.

13           SO I WOULD SUPPOSE WE WOULD LIKE TO GET GOING ON  
14 THE APPEAL OF THOSE ISSUES THAT HAVEN'T BEEN ADDRESSED, OR  
15 THAT ARE NOT GOING TO BE ADDRESSED BY THE NINTH CIRCUIT.

16           **THE COURT:** WHAT IS THE CONCRETE PREJUDICE OTHER  
17 THAN THE ARGUMENT THAT ALWAYS EXISTS, WHICH IS THAT YOU'D  
18 LIKE TO GET AN ANSWER SOONER RATHER THAN LATER?

19           **MR. VALERIAN:** THAT'S ALL.

20           **THE COURT:** OKAY. SUBMITTED?

21           **MR. MCTIGUE:** THANK YOU.

22           **MR. VALERIAN:** SUBMITTED.

23           (THEREUPON, THIS HEARING WAS CONCLUDED.)  
24 STENOGRAPHY CERTIFICATION

25           "I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT  
FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER."  
SEPTEMBER 19, 2019  
/S/KATHERINE WYATT